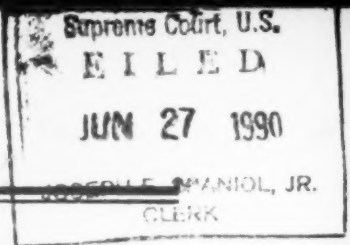


(2)
No. 89-1874



IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MESA VERDE CONSTRUCTION Co.,
Cross-Petitioner,
v.

NORTHERN CALIFORNIA DISTRICT COUNCIL
OF LABORERS, and
CARPENTERS 46 NORTHERN CALIFORNIA
COUNTIES CONFERENCE BOARD,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION
FOR A WRIT OF CERTIORARI

VICTOR J. VAN BOURG *
SANDRA RAE BENSON
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
875 Battery Street, 3rd Floor
San Francisco, CA 94111
(415) 864-4000
Attorneys for Cross-Respondents

June, 1990

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001



BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTRODUCTION	1
THE CROSS-PETITION DOES NOT RAISE ISSUES WORTHY OF THIS COURT'S PLENARY RE- VIEW	2
CONCLUSION	7

TABLE OF AUTHORITIES

<i>Cases:</i>	Page
<i>Carey v. Westinghouse Electric Corp.</i> , 375 U.S. 261, 268 (1964)	5
<i>Chevron, U.S.A. v. National Res. Def. Council</i> , 467 U.S. 837, 843 (1984)	6
<i>Deklewa v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 3</i> , 282 NLRB No. 184, 124 LRRM 1185 (1987), <i>affm'd</i> 843 F.2d 770 (3rd Cir., 1988), <i>cert. den.</i> , 57 U.S.L.W. 3259 (1989)	<i>passim</i>
<i>Int'l Assn. of Bridge, Structural and Ornamental Iron Workers v. NLRB</i> , 843 F.2d 770 (3rd Cir., 1988), <i>cert. den.</i> , 57 U.S.L.W. 3259 (1989)	1, 2
<i>Jim McNeff, Inc. v. Todd</i> , 461 U.S. 260 (1983)	2, 3, 5, 6, 7
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)	2
<i>Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers</i> , 861 F.2d 1124 (9th Cir., 1988) (<i>en banc</i>)	3, 4
<i>NLRB v. Bufco Corp.</i> , — F.2d — (1990, U.S. App. Lexis 4924) (7th Cir., 1990)	3
<i>NLRB v. Local Union No. 103 Int'l Assn. of Bridge, Structural and Ornamental Iron Workers (Higdon)</i> , 434 U.S. 335 (1978)	2, 3, 5, 6, 7
<i>NLRB v. W.L. Miller Co.</i> , 871 F.2d 745 (8th Cir., 1989)	3
<i>Statutes:</i>	
The National Labor Relations Act, as amended,	
§ 8(f), 29 U.S.C. § 158(f)	<i>passim</i>
§ 9(a), 29 U.S.C. § 159(a)	3, 4
The Labor-Management Relations Act, as amended,	
§ 301, 29 U.S.C. § 185	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1874

MESA VERDE CONSTRUCTION Co.,
v. *Cross-Petitioner,*

NORTHERN CALIFORNIA DISTRICT COUNCIL
OF LABORERS, and
CARPENTERS 46 NORTHERN CALIFORNIA
COUNTIES CONFERENCE BOARD,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF IN OPPOSITION TO CROSS-PETITION
FOR A WRIT OF CERTIORARI**

INTRODUCTION

This brief is filed in opposition to the Cross-Petition for a Writ of Certiorari. The Cross-Petition requests that this Court review both the National Labor Relations Board's (NLRB) interpretation of Section 8(f) of the National Labor Relations Act (29 U.S.C. § 158(f)) enunciated in *Deklewa v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 3*, 282 NLRB No. 184, 124 LRRM 1185 (1987), *affm'd*

843 F.2d 770 (3rd Cir. 1988), *cert. den.*, 57 U.S.L.W. 3259 (1989) as well as the Ninth Circuit's *en banc* decision to adopt the *Deklewa* rule in the instant case.¹

THE CROSS-PETITION DOES NOT RAISE ISSUES WORTHY OF THIS COURT'S PLENARY REVIEW

Cross-Petitioner's main argument appears to be that the decision of the Ninth Circuit adopting the Board's interpretation of the statute conflicts with the principles set forth in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). Specifically, Cross-Petitioner asserts that the NLRB, an administrative agency, has purported to overrule precedent of this Court in a case of statutory construction. As will be demonstrated, this argument is incorrect.

Cross-Petitioner's argument is based on the premise that this Court "independently construed" § 8(f) of the statute in *NLRB v. Local Union No. 103 Int'l Assn. of Bridge, Structural and Ornamental Iron Workers (Higdon)*, 434 U.S. 335 (1978) and *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). Proceeding from that premise, Cross-Petitioner argues that the NLRB was therefore precluded from interpreting the statute in *Deklewa* in a manner different from this Court's interpretation of the statute, and that the Ninth Circuit was likewise precluded from deferring to the Board's interpretation based on *stare decisis* principles.

Every court which has considered this issue has disagreed with Cross-Petitioner's position. Indeed, every Court which has considered the Board's interpretation of the statute in *Deklewa* has deferred to that interpretation as better serving the policies of labor stability and employee free choice, as well as reflecting a more accurate interpretation of the legislative history of the statute. See, *Int'l Assn. of Bridge, Structural and Orna-*

¹ It should be noted that this Court has already denied a Petition for Writ of Certiorari to review the Board's *Deklewa* decision. (*Deklewa*, *supra*, 57 U.S.L.W. 3259 (1989)).

mental Iron Workers v. NLRB, 843 F.2d 770 (3rd Cir., 1988), *cert. den.*, 57 U.S.L.W. 3259 (1989); *Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir., 1988) (*en banc*); *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir., 1989); and *NLRB v. Bufco Corp.*, — F.2d — (1990, U.S.App. Lexis 4924) (7th Cir., 1990).²

Before demonstrating that the Ninth Circuit was correct in finding that this Court did not “independently construe” § 8(f) in *Higdon* and *McNeff*, we believe it is important, despite Cross-Petitioner’s characterizations to the contrary, to set out what the *Deklewa* decision does *not* stand for:

First, Cross-Petitioner states that the Board in *Deklewa* divested employers of the right to repudiate § 8(f) agreements. That is not correct. The decision in *Deklewa* simply clarifies the manner in which such a “repudiation” must be accomplished, namely, by invoking the NLRB’s election procedures and the holding of a Board election in which a majority of the employees vote to decertify their union. Employers, unions and the employees are still free to file an election petition at *any time* during the collective bargaining relationship. Therefore, the right to “attempt” a repudiation of the agreement remains extant.

Second, Cross-Petitioner claims that *Deklewa* conferred upon construction industry unions *full* § 9(a) collective bargaining status. (29 U.S.C. § 159(a)). Again, that is not correct. Because of the final proviso to § 8(f) which permits parties to the agreement and the employees to file for an election at any time during

² The only conflict deals with the Ninth Circuit’s decision in this case not to apply *Deklewa* retroactively which conflicts with the decisions of all the other Circuits which have considered this question and conflicts with the NLRB’s application of *Deklewa*. The Unions’ Petition for Writ of Certiorari in this case seeks plenary review by this Court to resolve this conflict in the Circuits.

the relationship, which is unlike the "contract bar" rules applicable to other industries, "full" § 9(a) status is withheld from construction industry unions until and unless a majority of the employees vote for the union as their collective bargaining representative.

Third, Cross-Petitioner states that *Deklewa* was decided only "for administrative convenience". Certainly, administrative convenience was one of the prime concerns leading to the *Deklewa* rule as evidenced by the Board's and the Ninth Circuit *en banc* Court's discussion of the "morass of confusing evidentiary problems" which lead to the chaotic and inconsistent decisions under the pre-*Deklewa* law. However, even a cursory reading of *Deklewa* and *Mesa Verde* demonstrates that the primary factors leading to the *Deklewa* rule were the desire to further labor stability and employee free choice, and a desire to better effectuate the purposes of § 8(f) as evidenced by the legislative history of the statute.

Fourth, Cross-Petitioner's statement that *Deklewa* should not apply in the Section 301 context (29 U.S.C. § 185) because this case could never have been presented to the Board for adjudication (Cross-Petition p. 6 n.3) is simply wrong. The unions were under no obligation to file an unfair labor practice charge with the Board to remedy the employer's violation of the agreements. The unions have grievance procedures in their collective bargaining agreements to remedy violations of those agreements.³ That is the route the unions chose to pur-

³ It seems incomprehensible that Cross-Petitioner's counsel, who has been counsel of record since the beginning of this case, could have forgotten that this case involves grievances being processed through the arbitration provisions of collective bargaining agreements. However, that appears to be the case since Cross-Petitioner's counsel in two places states that this is a "trust fund" action under Section 301. (See Cross-Petition p. i "Questions Presented", and p. 6). This is not a trust fund lawsuit, and no trust funds are parties to this action. This is a traditional labor dispute between two unions and an employer concerning the processing of grievances

sue in vindicating their contractual rights. It has long been recognized by this Court that the "existence of a remedy before the Board for an unfair labor practice" does not bar individual employees or unions from pursuing alternative remedies provided by the collective bargaining agreement. See *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 268 (1964). Indeed, in *Carey*, the employer argued that it could not be compelled to proceed to arbitration because the grievance involved a representation issue within the exclusive jurisdiction of the Board. This Court disagreed with that argument and held that the union could pursue arbitration "even though an alternative remedy before the Board is available, which, if invoked by the employer, will protect him." (*Id.*)

Like the employer in *Carey*, the employer here, Mesa Verde, could have had this matter adjudicated by the Board by filing a petition for an election at the time it sought to repudiate the agreements.⁴ Mesa Verde could still file a petition before the Board in the event this case is ultimately decided against it. Mesa Verde, however, chose not to file such a petition because, as is also undisputed, a majority of its employees at all relevant times belonged to the unions. Therefore, the employer stood virtually no chance of winning such an election, and chose to ignore the mechanism provided in the statute for terminating the relationship so as to avoid losing an election among its employees. Thus, Cross-Petitioner mischaracterizes the alleged changes wrought by *Deklewa*.

Turning to the merits of Cross-Petitioner's main argument, specific language in both *Higdon* and *McNeff* dem-

under the grievance and arbitration provisions of collective bargaining agreements.

⁴ It must be kept in mind that the uncontested finding in this case is that at the time of the repudiation, Mesa Verde had an ongoing job on which it employed members of both unions.

onstrate that this Court was not “independently construing” § 8(f) in those cases. Rather, this Court was simply deferring to the NLRB’s interpretation of § 8(f). In *Higdon*, this court recognized that “[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.” *Higdon*, 434 U.S. at 350 (citation omitted). This Court then went on to discuss the Board’s then-current construction of § 8(f) and determined that it was not fundamentally inconsistent with the Act nor had the Board moved into a new area of regulation that Congress had not committed to it. Justice White concluded “that the Board’s construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections.” *Higdon*, 434 U.S. at 341. Compare, *Chevron U.S.A. v. National Res. Def. Council*, 467 U.S. 837, 843 (1984) (where there is “a legislative delegation to an agency on a particular question . . . a court may not substitute its own construction of a statutory provision for [the agency’s] reasonable interpretation . . .”).

Likewise, in *McNeff*, this Court relied on *Higdon*’s affirmance of the Board’s view of § 8(f). The Court noted that in *Higdon* it “approved the Board’s conclusion that a ‘pre-hire agreement is voidable’ ” *McNeff*, 461 U.S. at 269. However, more significantly, in *McNeff* this Court specifically declined to determine what actions would be necessary to effectuate such a repudiation, and noted that it may be necessary to “precipitat[e] a representational election pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support” (*Id.*, at 207 n.11). Therefore, even if it can be argued that *Higdon* and *McNeff* constituted this

Court's "independent construction" of the statute, the Board's decision in *Deklewa* simply answered the question left open by this Court in *McNeff* as to the proper *method* of effectuating a repudiation.

Finally, in *Higdon*, this Court recognized that the Board, after exercising its expertise in a given area, was not prohibited from changing its position on a matter of critical labor importance:

"An administrative agency is not disqualified from changing its mind, and when it does the courts will sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *Higdon*, 434 U.S. at 351.

Certainly labor stability in the construction industry is an issue of critical national importance. If the prior interpretation of the repudiation doctrine was hindering labor stability, the Board not only had the right but, indeed, the obligation to cure the defects in the prior interpretation of the statute.

CONCLUSION

In conclusion, it is respectfully submitted that the Board's interpretation of § 8(f) enunciated in *Deklewa* is reasonable, better serves the dual objectives of labor stability and employee free choice, and better serves the Congressional purpose of § 8(f) as reflected in the legislative history. Further, as each Court which has considered the question has found, the Board was not precluded from restructuring the repudiation doctrine in *Deklewa* by this Court's decisions in *Higdon* and *McNeff* since in those decisions the Court was not independently construing the statute but, rather, was deferring to the Board's interpretation of the statute which Congress has

mandated the Board administer. Therefore, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

VICTOR J. VAN BOURG *
SANDRA RAE BENSON
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
875 Battery Street, 3rd Floor
San Francisco, CA 94111
(415) 864-4000
Attorneys for Cross-Respondents

June, 1990

* Counsel of Record

